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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 231

In the Matter

of

ITEMLAB, INC.,

Bankrupt,

EIGHTEENTH AVENUE LAND CO.,

Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY G. INGRAHAM,
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Counsel for Respondent
Trustee in Bankruptcy

IN THE

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In the Matter of ITEMLAB, INC., *Bankrupt*, EIGHTEENTH AVENUE LAND CO., *Petitioner.*	No. 231

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner seeks to have this Court review an order of the Court of Appeals for the Second Circuit dismissing an appeal from the District Court. The District Court had set aside a mortgage given by the bankrupt to secure Petitioner's loan to the bankrupt and bearing an annual interest rate in excess of 80%. The ground for setting aside was failure to conform to state statute. The Court is respectfully referred to the opinion of the District Court which leaves no doubt that the instant petition, like the appeal to the Court of Appeals, is frivolous.

Petitioner's appeals have been characterized by delay during which period of delay it expected if successful on appeal to collect interest at the rate of 4% per month. Its record on appeal to the Court of Appeals was mailed to that Court by the District Court after the time to file the record and docket the appeal had expired. Forty days after that expiration date Petitioner applied to the Court of Appeals to file the record and docket the appeal without furnishing any excuse for its failure to apply sooner and without any

reference to the merits of its cause. A previous record of inexcusable delay was well known to the Court, and Counsel for Respondent had previously requested Petitioner in writing, to file its appeal on time, and warned that no extensions would be stipulated. The Court of Appeals refused Petitioner's application to file and docket the appeal.

A motion for rehearing was denied; a second motion was granted by two of the Judges who, it appears from their opinion, took advantage of the fact that the record was physically in the Clerk's possession and examined it. The Judges also had the benefit of extensive affidavits of Petitioner as to the merits of the appeal. On the basis of their examination they found the appeal frivolous.

The appeal was indeed frivolous; the claim now made by Petitioner that the District Court violated General Order 47 is simply not a fact. The District Court did not question the findings of the Referee in Bankruptcy.

This Petition merely raises a question of the Court of Appeals' interpretation of its own rules. Under its Rule 14(b) it will not hear an appeal filed and docketed too late unless there is a substantial question to be decided. Had the Court denied the petition to file and docket the appeal because there was no substantial question its conduct would not have been criticized. Because it took the time and trouble to study the record Petitioner feels aggrieved.

It is respectfully submitted that there is no issue here worthy of this Court's consideration.

Respectfully submitted,

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July 30, 1964.